

**LIABILITY IMPLICATIONS  
AND CONSIDERATIONS**

# LIABILITY IMPLICATIONS AND CONSIDERATIONS

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## BACKGROUND

In examining the issue of retrofitting of unreinforced masonry buildings, the question of potential tort liability is often brought up, sometimes as a disincentive for action (because determining that a building has a problem creates more liability than not knowing about a problem), and sometimes as an incentive for action (that fear of potential liability might act as an economic incentive for action).

The discussion in this chapter is limited to potential *tort liability*. A tort is a civil (as opposed to a criminal) wrong, other than a breach of contract, for which courts award damages. Thus, this discussion does not define liability in the broader, non-legal, context of the prospect of direct building or contents damage.

In assessing the potential for liability, one must understand that there are *4 elements of a tort*, each of which must be proven:

- a pertinent duty must be imposed on the building owner;
- the building owner must have violated that duty;
- the victim must have been injured or suffered damages; and
- there must be a causal connection between the building owner's negligence and the harm suffered by the victim.

The *concept of negligence* is usually based on the rule of reasonableness. How would a reasonable person have acted under similar circumstances? Could the injury or loss have been foreseen? What was the apparent magnitude of the risk? What were the relative costs and benefits of action vs. inaction?

Finally, the remarks in this chapter must be prefaced by noting the fact that after extensive research in the caselaw of 50 States, ABAG was unable to identify a single case where a public or private entity was held to be liable under traditional tort law for personal injury or physical damage directly resulting from earthquakes. Most cases are settled out of court, including the potential cases from the Loma Prieta earthquake in October 1989. In addition, if and when such a case makes it to trial, it will take approximately 2 more years to become an appellate court decision, and only appellate court decisions become legal precedent. However, *there is a very high probability that under the appropriate circumstances, liability will be imposed on either public or private entities for personal injury or property damage resulting from an earthquake.* The majority of this chapter spells out, in as clear a manner as possible, those circumstances for *private* building owners. As stressed below, the liability of the local government associated with those private buildings is exceedingly small.

### THE ANALYSIS

The most expeditious way to explain the operation of liability rules is to use a specific scenario. Therefore, assume the City Council of the City of Forward, California directs the implementation of a program to survey its entire city to determine the location of all unreinforced masonry buildings (as directed by California law) and, in addition, its downtown area to determine the location of all concrete buildings built between 1950 and 1970 (determined by the city to be most likely to be the non-ductile concrete buildings prone to pancake collapse in earthquakes). The program is implemented by the building department utilizing in-house engineers and other design professionals. The building department develops a list, including address and owner, and submits the list to the City Council. The City Council notifies the owners of the identified properties, but does not require retrofit of the buildings.

### PRIVATE OWNER LIABILITY

#### (a) No Remedial Action

Building owner Art receives the report and ignores it, doing nothing. A magnitude 7 earthquake strikes the City of Forward and there is significant personal injury and property damage on the property of the passive owner. If the injured parties can prove that the damages were caused in whole or in part by the dangerous conditions identified in the survey, there is a very high probability that liability will be imposed. The property owner has been placed on notice of the dangerous conditions of his property, and his callous reaction to such notice serves as both a legal and a social policy ground for recovery by the plaintiffs. In fact, under the circumstances, the plaintiffs may be able to recover punitive damages.

#### (b) Owner Study - No Remedial Action

Building owner Brenda receives the notice, engages her own experts, and has them develop a set of recommendations for retrofit. The experts determine that the building is reasonably safe. A magnitude 7 earthquake strikes the area and personal injury and property damage result. This building owner has some liability exposure. Depending on the process by which she selected the design and engineering professionals that she hired, and the directions given to those professionals in evaluating the building, her actions in following these recommendations appear reasonable and non-negligent. However, if there was negligence involved in selecting an unskilled design professional or instructing the professional in a way which clearly militates against a finding of earthquake hazards, that action may be judged negligent and be a source of liability.

### (c) Owner Study - Remedial Action

Building owner Clean-Up receives the notice, engages appropriate experts, and implements a retrofit. The earthquake strikes, and personal injury and property damage occur. Is the building owner liable? Mere compliance with the recommendations of the design professionals will not absolutely bar the imposition of liability. However, if the design professionals selected were skilled, it is unlikely that liability will be imposed. On the other hand, if the building owner had knowledge of a major defect which the designers overlooked, and it is this defect which causes either personal injury or property damage, liability will likely be imposed for such injuries or damage.

### LOCAL GOVERNMENT LIABILITY

To explore the issue of the liability of the local government associated with private buildings, it is necessary to change the scenario somewhat.

### (d) Decision to Survey

Would the City of Future have exposed itself to potential liability had it *not* conducted the survey? More specifically, Dale (the owner of a building) and his customers are severely injured in a moderate earthquake. The owner claims that he would have retrofitted his building had he been notified by the city that a problem existed.

If the city is in the portion of California covered by the California law requiring identification of unreinforced masonry buildings (with certain exceptions, including single-family homes), the city has a mandatory duty to undertake that portion of the earthquake building survey. The city is liable for its failure to comply with a mandatory duty unless it has exercised "reasonable diligence" to discharge that duty.

One possible defense might be that the city did not have sufficient funds to undertake the inventory activities mandated by the State statute in the then current fiscal year. The harm suffered MAY be of the type against which the statute is designed to protect. The issue is foggy because the statute does not require the retrofitting of buildings. Therefore, its primary purpose is to inform and educate property owners. A foreseeable, and desirable, result would be remedial action by the property owner. At the present time, there is no reported case which would help determine if this apparent but secondary purpose of the statute is one on which the plaintiff can base a claim that the statute was "designed" to protect against the injuries and damages which would result from an unreinforced masonry building failure in an earthquake.

The next question is whether the local government has exercised reasonable diligence in the discharge of its duty. In this situation, the City of Future's use of due diligence to locate existing funds or to seek new funds to finance compliance with the law are presumed facts. Therefore, the immunity ought to apply. However, if funds become available in the future, it will be unreasonable for the local government to refuse to comply and immunity would no longer apply.

Even if the mandatory duty doctrine applies, it may be very difficult for Dale and his customers to prove that the failure of the City of Future to inventory the affected building proximately caused the injury which occurred. First, he would have to prove that the retrofit would have retrofitted the building. Second, he must prove that the retrofit would have prevented the particular harm which is the subject of the lawsuit.

With respect to those types of private buildings which are *not* constructed of unreinforced masonry, the question becomes: is there a legal duty on the city to conduct such a survey? A decision to implement such a program by the policy making body of the jurisdiction (in this case, the City Council) should fall under the discretionary immunity provisions of Government Code Sections 830 and 835.

#### (e) Inspection Process

Is the City of Future liable if the survey program is undertaken, but the inspections themselves or the consequent recommendations were conducted negligently? The California Government Code Section 818.6 immunizes local governments for an inspection process. The immunity would probably extend to the recommendations resulting from such inspections.

#### THE "ACT OF GOD" DEFENSE

Throughout this discussion, some may assume that the earthquake, being a natural, unpredictable and awe-inspiring event, is an "act of God" for which no liability should be imposed. This is not true.

The "act of God" defense is not triggered by the occurrence of a natural catastrophe which sets into motion a chain of events causing the injury or damage. If the natural catastrophe is one, which is reasonably foreseeable and for which reasonable precautions can be taken, then the "act of God" defense is not available. The reasonable building owner must assume that a major earthquake will strike at or near its building while that building is in its ownership. It will be fruitless for the owner of a building to state that the injuries and damages that might result from the failure of its building during an earthquake could not be foreseen by it. Mass

media have disseminated information on earthquake hazards and the technical expertise necessary to evaluate and mitigate some of those hazards is available. The courts will conclude that it is only reasonable to expect responsible property owners to take some precautionary measures.

#### ECONOMIC ISSUES ASSOCIATED WITH LIABILITY EXPOSURE

Another issue surrounding liability to owners is related to the extent to which property retrofit, by lessening liability exposure, acts as an economic incentive to retrofit. The economic argument is weak for at least two reasons. First, although retrofit reduces the liability exposure, it does not remove it entirely. The second reason relates to, in a practical manner, how liability (whether for earthquakes or other risks) is handled. A typical building owner might have \$2 million in comprehensive general liability insurance coverage (CGL). As a result of learning of the hazard at its building, it might increase its CGL from \$2 million to \$10 million. The incremental cost of such an increase in coverage is minuscule in comparison to its other costs of doing business. Insurance companies offering GLC will typically find it more expensive to determine the type of construction of those buildings owned by the businesses it covers than the risk of loss. However, in the case of large companies which are self-insured, such risks are more likely to have economic weight. As a practical matter, however, these large businesses are unlikely to own the unreinforced masonry buildings typically being discussed for retrofit. They are more likely to own the non-ductile concrete buildings prone to collapse. Liability exposure may function as an economic incentive for these owners.

#### AUTHORITY OF LOCAL GOVERNMENTS TO CONDUCT SURVEYS AND REQUIRE RETROFITTING

Another legal issue, not associated with liability, surrounds the authority of local governments to conduct surveys and require retrofitting. Unlike the liability issues, there is clear caselaw in this area. Specifically, the police powers case of Barenfield v. City of Los Angeles, 162 Cal.App. 3d 1035, 209 Cal.Rptr. 8 (1984) clearly establishes this authority. It is important to note that the case was determined prior to the passage of the California law requiring many local governments in California to survey unreinforced masonry buildings and notify owners.

The city enacted a local ordinance which required the owners of all buildings constructed prior to October 6, 1933 which have unreinforced masonry bearing walls (with exceptions not applicable to this case) to take remedial actions designed to reduce earthquake-related

hazards. Each of the plaintiffs owned one or more buildings subject to the ordinance. Each of them received an order from the city requiring them to (1) perform seismic retrofitting of the building(s), or (2) submit a structural engineering analysis indicating that the building(s) meet the ordinance standards, or (3) install temporary safeguards so as to qualify for an extension of time to comply with (1), or (4) demolish the building(s). Plaintiffs sued claiming the ordinance constituted an unconstitutional taking of private property without compensation.

In support of its motion, the city offered evidence that unreinforced masonry buildings pose a safety threat to the public and that the ordinance bore a reasonable relationship to the objective of making the public more safe from this hazard. The plaintiffs offered evidence questioning whether the ordinance's provisions had a reasonable relationship to increased safety. The trial court granted the city's motion for summary judgment.

The appellate court noted that the issue of the reasonableness of the ordinance's provisions was brought into question by the plaintiffs' evidence. However, as challenge to the constitutionality of an enactment, the court must defer to the legislature's judgment unless it is manifestly unreasonable, arbitrary or capricious. *The court also upheld, without exposition, the ordinance's regulation of private property use as a valid exercise of the city's police powers and not as a taking.*

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